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No. 05-746

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Missouri

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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January 10, 2006

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad

[1] The letter expressing consent has been filed with the Clerk of the Court.

industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. Because FELA litigation is an ongoing event for all major railroads—several thousand FELA suits are filed each year—AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA. In this case, the court below improperly expanded railroad liability under FELA by instructing the jury that a different, more stringent standard of causation applies to employee negligence than applies to employer negligence. This holding, which gives primacy to application of state-approved instructions over federal substantive law, confers a serious and unwarranted disadvantage on railroad defendants in numerous cases arising under FELA.

When AAR participates as *amicus curiae* in a FELA case like this one, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling, by bringing the perspective of an

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[2] *E.g., Illinois Cent. R.R. v. Smallwood*, 125 S.Ct. 1825 (2005); *National R.R. Passenger Corp. v. Griesser*, 534 U.S. 970 (2001); *Kansas City Southern Ry. Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

before Congress, administrative agencies and the courts on behalf of the railroad industry.

One such matter is the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, a 95 years old negligence statute under which railroad employees who are injured on the job may seek compensation from the employing railroad. FELA presents unique issues and problems for railroads as it differs fundamentally from the compensation systems covering virtually all other U.S. industries: subsequent to FELA's enactment, every state enacted a workers' compensation law, under which the concept of assigning fault for workplace injuries is abandoned in favor of the principle that all employees suffering legitimate work-related injuries are deserving of compensation. Despite the advent of workers' compensation, FELA remains intact, and each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads. All told, the railroads spend close to a billion dollars annually in the payment and defense of claims brought under FELA. Thus, FELA litigation is an ongoing event for all major railroads, to which they devote substantial legal and financial resources.

In this case, the trial court improperly instructed the jury on the issue of comparative negligence and in so doing denied the defendant railroad one of its key rights under FELA. In upholding the rote application of state-approved jury instructions, the court below ignored (1) the principle that in interpreting FELA state law must yield to federal law; and (2) decisions of this and other courts on the substantive issue of comparative negligence, one of the most important features of FELA. Because jury awards under FELA must be reduced in proportion to the employee's contributory negligence, failure properly to instruct on this issue can have significant impact on a FELA defendant's obligation to pay damages. This error was compounded by the court's additional ruling which makes judicial review of the jury's assessment of the

employee's negligence virtually impossible. Since AAR's largest members, and numerous other railroads, operate in Missouri, and, because it is easy to bring and maintain out-of-state cases in Missouri courts, this case is of utmost interest to AAR and its members.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

By instructing the jury that a different standard of causation applies to employee negligence than to employer negligence, and by prohibiting the jury from recording its finding on contributory negligence, the court below improperly elevated state-approved instructions over established federal law. This ruling discriminates against FELA defendants with respect to a key aspect of FELA: the right to have damages reduced in proportion to the plaintiff's contributory negligence. A vestige of an earlier era that is at odds with the principles embodied in modern workers' compensation systems, FELA makes each party responsible to the extent its negligence causes a workplace injury. While several features of FELA are designed to promote recovery, its comparative negligence regime can, and often does, mitigate the defendant's obligation to pay damages.

The state-approved instructions utilized below are contrary to established precedent and undermine the principle that FELA litigants are entitled to uniform application of the statute nationwide. This case is of concern to railroads because it vitiates what often is the most viable defense available to them and upsets the balance established by Congress in crafting FELA as a compensation system for the railroad industry. Moreover, this is not merely a local matter. FELA's venue provision is very broad, permitting suits to be filed in jurisdictions that have little nexus to the case. The court below has become a magnet for such filings, and is notorious for

routinely denying *forum non conveniens* motions no matter how tenuous the connection between the jurisdiction and the underlying claim.

ARGUMENT

I. THE COURT BELOW DISCRIMINATED AGAINST FELA DEFENDANTS BY IMPROPERLY ELEVATING STATE-APPROVED INSTRUCTIONS OVER FEDERAL LAW

Wedded to form, state-approved instructions, the court below incorrectly charged the jury on a key aspect of this case, violating a fundamental principle that FELA litigants are entitled to "receive similar treatment in all states." *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943). In this case, a railroad employee who was injured on the job brought a FELA suit alleging the employing railroad negligently caused his injury. In its defense, the railroad contended that the employee's negligent conduct caused, or at least contributed to, the accident. Pet. at 4-5. Though the underlying facts may vary, this scenario is typical of many cases that are litigated every year between railroads and their employees under this unique federal law. As is often the case, the jury was called upon to determine whether the railroad and/or the employee were negligent, and assess the extent to which the negligence of both parties, if any, was responsible for causing the injury.

Rather than instructing the jury that the same causation standard applies with regard to both the employer's negligence and the employee's contributory negligence—a well-established point of federal law—the trial court's instructions set forth different standards. The instructions given by the court called for a more exacting standard of causation when assessing the employee's negligence, imposing a heavier burden on the railroad than on the employee.[2] This error was

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[2] Just as the burden of proof for showing employer negligence is on a FELA plaintiff, the burden of proving employee contributory negligence

compounded when the trial court, again utilizing state-approved instructions, did not allow the jury to specify whether it found the employee to have been contributorily negligent, and, if so, in what proportion. Instead, the court's instructions and general verdict advised the jury to calculate gross damages and to reduce those damages by the plaintiff's percentage of fault, without recording those finding on the verdict form. This practice is inconsistent with FELA and impermissibly discriminates against FELA defendants inasmuch as Missouri law requires the jury to write its findings of comparative fault in all other negligence actions.

As petitioner demonstrates, invoking divergent standards of causation for employer and employee negligence in FELA cases is both contrary to precedent of this Court, and impractical in application. Pet. at 10-12.[3] Similarly, the failure to require a special verdict on contributory negligence also is contrary to established precedent and practice. Pet. at 20-21. This denial of petitioner's ability to vindicate its rights under FELA is of no small consequence, either to petitioner in this case, or to the railroad industry as a whole. The jury in this case returned a verdict of $1.5 million. Because there was clear evidence of contributory negligence, the manner in which the jury assessed that issue had potentially significant monetary consequences: for example, a finding that the plaintiff's negligence was 50% responsible for the injury would have reduced the verdict by $750,000. Given the frequency with which contributory negligence is an issue in FELA cases, and the potential for verdicts of six, and even seven,

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is on the defendant. *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 512 (1915).

[3] Petitioner also shows that the Missouri instructions on contributory negligence conflict with the decisions of several federal courts of appeals and state supreme courts. Pet. at 13-14.

figures,[4] other railroads could soon find themselves in a similar situation.

A. Comparative Negligence is a Key Aspect of FELA's Compensation Scheme

The nature and structure of FELA elevate the issue of contributory negligence to one of great importance, making it essential that courts properly instruct juries on this issue. FELA establishes a compensation system that differs fundamentally from those that cover virtually all other American workers (and, in fact, workers throughout the world).[5] In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted FELA as a tort-based remedy for railroad employees injured on the job, who, at that time, had little legal recourse. This was an era when working in the railroad industry was undoubtedly hazardous, and resulted in a great human toll.[6] Moreover, the common law of negligence had erected a num-

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[4] From 2000 through 2004, there were 56 FELA verdicts in excess of $1 million.

[5] Other than railroads, and the maritime industry, to which the substance of FELA applies by virtue of the Jones Act, 46 U.S.C. §688, all industries in the United States are covered by either state or federal no-fault workers' compensation systems. Most states enacted workers' compensation laws of general application between 1910 and 1920; by 1930 all but four states had enacted a workers' compensation law, with Mississippi being the last in 1948. Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L & Econ. 305, 319-20 (1998). No-fault workers' compensation is the prevailing model worldwide today. PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 14 (1998).

[6] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87, 644 were injured. Interstate Commerce Commission, *Statistics of Railways in the United States 1908* 41, 99 (1909).

ber of often insurmountable barriers as obstacles to recovery for injuries sustained by workers.[7]

Against this backdrop, and with the goal of providing a progressive and meaningful remedy, Congress enacted FELA, initially in 1906, and, after addressing constitutional flaws in the original statute, again in 1908.[8] Through FELA, Congress sought to address the perils posed by railroad employment and to provide compensation to employees who suffered injury or death as a result of their employer's negligence. *See Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 542 (1994).

When it enacted FELA, Congress adopted what was at the time the universal compensation model in the United States: the law of negligence. The policy embodied in FELA was that railroads were to be liable in damages for injuries sustained by employees in the course of their railroad employment when such injuries were caused by the negligence of the railroad. To ameliorate the harsh results which often were a

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[7] For example, recovery was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Souix City R.R.*, 9 N.W. 581 (1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875). The fellow servant rule, a variant of the assumption of the risk doctrine, held that among the ordinary risks of employment the employee takes upon himself is the "carelessness and negligence of those who are in the same employment," on the theory that "these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49, 57 (Mass. 1842). The rule that contributory negligence by the plaintiff barred recovery even if the defendant was at fault traced back to English common law, *Butterfield v. Forrester*, [K.B. 1809] 11 East 60, and was the prevailing rule in the United States in the nineteenth century. *E.g., Louisville, Nashville & Great Southern R.R. v. Fleming*, 82 Tenn. 128 (Tenn. 1884)("In England and a majority of the States of the Union, the negligence of the plaintiff which contributes to the injury is held to be an absolute bar to the action.")

[8] *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908); *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

consequence of prevailing legal doctrine, Congress modified some aspects of the existing common law in an effort to promote recovery. *See Gottshall,* 512 U.S. at 542-43. For example, the fellow servant rule, which absolved the employer of responsibility to provide compensation where the injury was the consequence of the negligence of another employee, was eliminated. *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916) ("Congress . . . abrogated the common law rule known as the fellow servant doctrine by placing the negligence of a coemployee upon the same basis as the negligence of the employer.")

Significantly, FELA was an early example of a comparative fault statute, at the time a significant innovation in tort law. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003). ("Among [FELA's] innovations, the Act expressly directs apportionment of responsibility between employer and employee based on comparative fault." *Id.* at 161.) Rather than barring any recovery if the employee's negligence contributed to the injury—the prevailing rule at the time—under FELA damages were only to be reduced in proportion to the employee's negligence. 45 U.S.C. §53. This opened the opportunity for recovery in many instances where it previously would have been denied. However, the efficacy of the comparative fault rule was somewhat diluted because, other than in cases where a safety statute was violated, the doctrine of assumption of the risk remained a viable defense for the first three decades after FELA's enactment. *See Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 62-64 (1943) on the difficulty courts had distinguishing contributory negligence from assumption of the risk, with railroads often arguing that the employee's conduct constituted the latter.[9]

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[9] One court described the difference between the two concepts as follows:

> An employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties consti-

In 1939, Congress disposed of this concern by eliminating the assumption of the risk defense in all FELA cases. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404, thereby "making the principles of comparative negligence the guiding rules of decision in accident cases." *Tiller*, 318 U.S. at 65. As this Court explained, FELA "permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned." *Id.*

Thus, Congress struck a balance, requiring that each party bear the consequences of its own negligence. See Pet. at 3. This contrasts with the workers' compensation systems under which "negligence and fault are largely immaterial, [ ] in the sense that the employee's contributory negligence does not lessen his or her rights . . ."[10] In holding employees responsible for their own negligent conduct FELA may indeed conflict with the prevailing concepts of addressing workplace injuries, but it is the system Congress has chosen to adopt for workplace injuries in the railroad industry. Railroad employee representatives acknowledge and accept this aspect of FELA. *See Hearing to Receive Testimony on the Federal Employers' Liability Act (FELA) in Relation to Amtrak, Before the Subcomm. on Surface Transportation of the Senate*

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tutes assumption of the risk. Contributory negligence, in contrast, is a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist.

Taylor v. Burlington Northern R.R., 787 F.2d 1309, 1316 (9th Cir. 1986).

[10] A. Larson & K. Larson, *Larson's Workers' Compensation Law* §1.01 (2004 ed.) "Misconduct of the employee, whether negligent or wilful is immaterial . . . unless it takes the form of deviation from the course of employment, or unless it is of a kind specifically made a defense in the jurisdiction containing such a defense in their statute." *Id.* at Ch. 32. Some statutory exceptions to the general rule that contributory negligence does not serve to reduce or eliminate the right to benefits are self-injury, intoxication, or wilful misconduct by the employee. *Id.* at §32.01.

Comm. on Commerce, Science and Transportation, 100th Cong. 98 (1988) (statement of Fred A. Hardin, President, United Transportation Union)("If the railroad can prove that we caused the accident ourselves, we were negligent, then I do not think the railroad owes us anything.")

B. Comparative Negligence Can Have a Great Impact on Damages in FELA Cases

The ability to reduce damages in proportion to an employee's contributory negligence is a key aspect of FELA, and often is the most viable means of defending a FELA claim. Numerous scenarios can give rise to a comparative negligence defense. "[W]hen an employee carries out his supervisor's general orders in an unsafe manner, he is responsible under FELA for his own contributory negligence." *Jenkins v. Union Pac. R.R.*, 22 F.3d 206, 211 (9th Cir. 1994). For example, when an employee injured his back while attempting to move a 150 pound manhole cover by himself, the jury's finding that he was 50% negligent for failing to seek help or to use a safer method was affirmed. *Gish v. CSX Transp., Inc.*, 890 F.2d 989 (7th Cir. 1989). Another employee was found to be 50% negligent when "electing to position himself directly under the primary source of peril, [he] engaged in a voluntary act which added new danger . . . to the employer permitted conditions of the work area." *Higgins v. CSX Transp., Inc.*, 455 S.E.2d 129, 131 (Ga. App. 1995). Even an employee's behavior outside of the workplace may be considered contributory negligence. *Zarrow-Smith* v. *New Jersey Transit Rail Operations, Inc.*, 953 F.Supp. 581 (D. N.J. 1997)(Where employee claimed her lung cancer was the result of exposure to asbestos on the job, the employee's smoking could be considered contributory negligence.)

FELA places an obligation on railroad employees to work safely and obey applicable railroad safety rules, and the failure to obey safety rules may be considered contributory

negligence. *E.g., Plembeck v. Union Pac. R.R.*, 441 N.W.2d 614 (Neb. 1989). In *Uhrhan v. Union Pac. R.R.*, 617 N.E.2d 1182 (Ill. 1993), the Illinois Supreme Court found that evidence that plaintiff did not comply with railroad safety rule requiring that employees watch for tripping hazards when walking in rail yards warranted an instruction on contributory negligence. (Reversing Appellate Court and affirming 40% reduction in damages for contributory negligence.) In another case, the court held that a plaintiff who was injured while stepping off of a rail car had "a duty to look carefully, and failure to do so would have been negligent." *Harris v. Illinois Cent. R.R.*, 58 F.3d 1140, 1144 (6th Cir. 1995) (Granting a new trial due to failure to instruct jury on contributory negligence.)

A finding of contributory negligence can serve substantially to reduce a railroad's liability. *Shepherd v. Metro-North Comm. R.R.*, 791 F. Supp. 1008 (S.D.N.Y. 1992)(Evidence supported a jury finding that plaintiff's negligence was 90% the cause of the injury.); *Plembeck*, 441 N.W.2d at 618 (Affirming jury finding that employee was 90% negligent.) In fact, an employee's negligence can completely bar recovery if the jury finds that it was the sole cause of the injury. *E.g., Taylor v. Illinois Cent. R.R.*, 8 F.3d 584 (7th Cir. 1993) (Approving instruction that "contributory negligence" means "negligence on the part of the plaintiff that contributed in whole or in part to the alleged injury." *Id.* at 586.)

Not only did the court below erroneously charge the jury on the issue of comparative negligence, another local rule applied by the court in this case made it virtually impossible for the parties to obtain meaningful review on that important issue. As petitioner demonstrates, in cases where evidence of contributory negligence has been presented the practice of instructing juries not to reveal whether and in what amount they found contributory negligence is inconsistent with federal law. Pet. at 20-21. This application of local practice,

which in this case treated FELA cases differently from other cases filed in the state's courts, patently discriminates against railroad FELA defendants.

C. The Court Below Tipped the Balance Established by Congress When it Enacted FELA

By applying a more exacting standard on FELA defendants for proving causation with regard to employee negligence, the court below undermined the scheme established by Congress. Although FELA liability is based on a showing of common law negligence on the part of the railroad, *Urie v. Thompson*, 337 U.S. 163, 182 (1949), a number of features of FELA, both set forth in the statute, and judicially construed, have eased the path toward collecting damages from railroads. Common law defenses have been eliminated. *See supra* pp. 7-8. In addition, regardless of how many joint tortfeasors may be responsible for the injury, if the railroad's negligence played even a small role in causing the injury a FELA plaintiff may collect full damages from the railroad defendant. *Ayers*.[11]

Moreover, once a FELA plaintiff clears the hurdle of proving that the employer's fault caused his or her injury, FELA contains no caps or limitations on the amount of damages that may be recovered.[12] In FELA cases, juries typically are given wide discretion to make determinations of fact, including

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[11] In *Ayers*, a FELA plaintiff who alleged an asbestos-related illness and testified that he may have been exposed to asbestos at his railroad job for three months was permitted to collect full damages from the railroad even though he had also been exposed to asbestos during the 33 years he was employed as a pipefitter outside the rail industry.

[12] This is another fundamental difference between FELA and workers' compensation statutes. Typically, workers' compensation benefits are capped: "[t]he amount of compensation for disability depends on the worker's previous earning level, for most acts award a percentage of average wage, somewhere between a half and two-thirds. But practically all acts also set a maximum in terms of dollars per week." Larson at § 1.03[5].

questions about the extent of damages suffered. *Schirra v. Delaware, L. & W. R.R.*, 103 F.Supp. 812, 823 (M.D. Pa. 1952)("[T]he jury would be justified in awarding plaintiff a substantial sum of money to fairly compensate him for past and future pain, suffering and inconvenience, and the amount to be awarded is peculiarly within the discretion of the jury, provided it is within reason.") A compensatory damages award under FELA will be deemed excessive only if it "shock[s the] judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993) ($1.75 million verdict, including over $1 million in intangible damages, not excessive). Thus, large awards, while not the norm, are not uncommon. *E.g., DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678 (7th Cir. 1995)($4.2 million award affirmed). In fact, St. Louis, the jurisdiction where this case was tried, has recently produced astounding eight-figure FELA verdicts. *See Infra* pp. 18-19.

In addition to being able to collect uncapped damages, many FELA plaintiffs also are entitled to disability benefits under the Railroad Retirement Act as compensation for their work-related injuries. 45 U.S.C. §231a(a). With near unanimity, courts have precluded this fact from being made known to the jury or to be used to offset FELA damages.[13] Thus, proving comparative negligence often is the only viable means for mitigating FELA damage awards. However, the ruling below tips the balance even further in favor of recovery by FELA plaintiffs in a manner that is completely unwarranted.

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[13] These rulings are primarily the result of an expansive reading of dicta in *Eichel v. N.Y. Cent. R.R.*, 375 U.S. 253 (1963). The railroad industry has urged this Court to clarify or reconsider *Eichel*, as it has been interpreted to enable many rail employees to collect dual benefits, both funded by the employer, for the same injury. *E.g. Kansas City Southern Ry. Co. v. Giddens*, 29 S.W.3d 813 (Mo. 2000), *cert. denied*, 532 U.S. 990 (2001).

D. The Decision Below Disregarded the Rule that Uniform Federal Law Applies in FELA Cases

Beyond the circular reasoning that the instructions given in this case were proper because they are part of the Missouri Approved Instructions, the court below articulated no rationale for mandating divergent causation standards in FELA cases. Certainly, the court paid no heed to the long-standing FELA principle that matters of substance are questions of federal law. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980); *Urie*. On this, the precedent of this Court could not be more clear. A fundamental aim of FELA's enactment was to promote national uniformity by removing the subject of compensation for workplace injuries in the railroad industry from being subject to the vagaries of state law. *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367 (1953)(FELA "supplant[s] a patchwork of state legislation with a nationwide uniform system . . ." *Id.* at 371). FELA "create[s] uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all states." *New York Cent. R.R. v. Winfield* , 244 U.S. 147, 150 (1917). *See also Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952)("State laws are not controlling in determining what the incidents of this federal right shall be." *Id.* at 361.)

Consistent with this principle, this Court has ruled that states may not justify jury instructions that misstate the law in FELA cases on the grounds that they are part of the state's approved instructions. *St. L. Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985). In *Dickerson*, this Court rejected the Missouri court's refusal to given a correct instruction on the proper measure of damages—in that case the need for the jury to reduce a damage award to present value—because such an instruction was not part of the Missouri Approved Instructions. This Court held that federal law addressed the

subject of present value (an aspect of damages), and that the Missouri court was obligated to apply that law, its approved instructions notwithstanding.

As in *Dickerson*, in this case too "existing law provides a clear answer" on the substantive question at issue that is at odds with the Missouri Approved Instructions. See Pet. at 9-14. Therefore, it is of no moment whether, as the court below stated, the instruction given in this case "was the correct instruction" under Missouri law.

II. WHILE THIS COURT IS NOT ALONE IN PROMOTING UNWARRANTED EXPANSION OF FELA LIABILITY ITS RULING IS PARTICULARLY LIKELY TO HAVE A WIDESPREAD IMPACT ON FELA LITIGATION

A. Like the Court Below, Other Lower Courts Have Improperly Promoted FELA Recovery Through Erroneous Interpretations of the Statute

The case below is not an isolated result; rather it is representative of a problem that pervades FELA jurisprudence. First, it is but one example of a tendency among lower courts to rely on local rules, or their own notions of how FELA should be interpreted, improperly to expand railroad liability. Second, FELA facilitates practices that can greatly magnify the impact of such erroneous local rulings, a result particularly likely here.

Like the court below, some courts have construed FELA to further facilitate a plaintiff's ability to recover damages by eviscerating the principles of negligence on which the statute is based, thereby moving FELA closer to being a workers' compensation law and railroads closer to being insurers of their employees' health and safety, in disregard of the words

of the statute and prior precedent.[14] For example, some courts have held that FELA establishes a standard of care that differs qualitatively from ordinary negligence, that of "slight" negligence. *Beeber v. Norfolk Southern Corp.*, 754 F.Supp. 1364, 1372 (N.D. Ind. 1990)("If the defendant's negligence, however slight, plays any part in producing plaintiff's injury, the defendant is liable."); *Walsh v. Consolidated Rail Corp.*, 937 F.Supp. 380, 382 (E.D. Pa. 1996)("FELA imposes a stringent duty of care. 'Slight negligence necessary to support a FELA action, is defined as a failure to exercise *great* care . . .'"); *Pry v. Alton & Southern Ry. Co.*, 598 N.E.2d 484, 499 (Ill. App. 1992)(Under FELA "[o]nly slight negligence of the defendant needs to be proved . . "). *See also Williams v. Long Island R.R.*, 196 F.3d 402 (2nd Cir. 1999)(The Second Circuit construes FELA "as creating a relaxed standard for negligence and causation." *Id.* at 406); *Cent. of Georgia v. Kelson*, 505 S.E.2d 803, 808 (Ga. App. 1998)(Only slight negligence, defined as a failure to exercise *great* care, is necessary to support a FELA action.).

Some courts have found other ways to facilitate recovery. *Syverson v. Consolidated Rail Corp.*, 19 F.3d 824 (2nd Cir. 1994)(Holding that "under FELA and the case law construing it, the common-law negligence standards of foreseeability and causation normally applied in summary judgment are substantially diluted." *Id.* at 825); *Mitchell v. Missouri-Kansas-Texas R.R.*, 786 S.W.2d 659 (Tex. 1990)("Foreseeability is thus not part of the causation standard as to negligence in FELA cases." *Id.* at 661). In a similar vein, the court below advanced a recovery-promoting interpretation of FELA that finds no warrant in the statute or controlling precedent.

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[14] *See Gottshall*, 532 U.S. at 543; *Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947)

B. FELA's Venue Provision and Local Practice is Likely to Magnify the Impact of this Case

Even though this case involves erroneous instructions used in only one state, it can have a significant impact on the adjudication of FELA claims. To begin, because the Missouri Approved Instructions are used in all FELA cases in Missouri courts, there is the potential for significant error in every such case. Missouri is a state with significant railroad activity. Seventeen freight railroads operate in Missouri, over 4,122 miles of track. Missouri is the home to nearly 8,000 rail employees.

Not only is Missouri an important railroad state, but rulings of Missouri courts can impact FELA cases arising far beyond its borders. FELA suits may be brought wherever the railroad is doing business, 45 U.S.C. §56, which as an initial matter gives plaintiffs wide latitude in choosing where to bring a lawsuit. Moreover, a FELA case brought in state court, often the preferred venue for plaintiffs, may not be removed to federal court. 28 U.S.C. §1445(a). The 17 railroads operating in Missouri include the four largest in the nation. Thus, FELA suits arising from accidents which occur on parts of their systems distant from Missouri can easily find there way into that state.

Not only does FELA's broad venue provision allow plaintiffs to choose from among a wide range of forums, once a case is filed, it is relatively easy to keep it in the selected forum. Missouri venues are a case in point. To keep FELA cases in St. Louis, a jurisdiction perceived to be plaintiff-friendly, plaintiffs have resorted to the tactic of retaining a St. Louis doctor to "treat" them. This will usually be enough to defeat a *forum non conveniens* motion even if the plaintiff neither lives nor was allegedly injured in Missouri. *E.g., Euton v. Norfolk & Western Ry. Co.*, 936 S.W.2d 146 (Mo. App. 1997)("The fact that [plaintiff's] treating physician practiced in St. Louis" was sufficient to defeat *forum non*

conveniens motion "[e]ven though most of the events took place outside the state of Missouri." *Id.* at 154)[15] In fact, "it appears that no Missouri appellate court has ever issued a writ directing a trial court to dismiss a case on grounds of *forum non conveniens*. *State ex rel. Kansas City Southern Ry. Co.*, 998 S.W.2d 185, 191 (Mo. App. 1999).

It is no surprise that numerous out-of-state FELA cases, like this case, are brought in Missouri, and in St. Louis in particular.[16] Along with Madison County, Illinois, the City of St. Louis was recently recognized as one of the select few jurisdictions that are "plaintiff-friendly courts" with "eye-popping jury awards." *Civil Wars*, NEWSWEEK, Dec. 15, 2003, at 43 & 48. This has already resulted in what has been described as the "tremendously disproportionate burden carried by the citizens of St. Louis who are called to jury service." *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 860 (Mo. banc 2001) (Wolff J., concurring in part and dissenting in part)(noting that the preponderance of the anecdotal evidence is that St. Louis juries are far more favorably disposed toward injured plaintiffs than juries from other parts of the state.) This concern was underscored by two recent St. Louis verdicts. In one case a jury awarded $17 million to a conductor who fell while descending from a rail car. *Nidlinger v. Norfolk Southern R.R.*, No. 032-1596 (St. Louis

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[15] *See also Arellano v. Union Pacific R.R.*, No. 052-08470 (2005) (Plaintiff resides and alleges injury in Kansas); *Wood v. Norfolk Southern Ry. Co.*, No. 042-01171 (2005) (Plaintiff resides and alleges injury in Ohio); *Smith v. Union Pacific R.R.*, No. 042-01921(2005)(Plaintiff resides Louisiana; no fact witnesses in Missouri); *Thorn v. Norfolk Southern Ry. Co.*, No. 012-09998 (2003)(Plaintiff resides and alleges injury in Michigan); In each of these cases, all tried in the Twenty-Second Judicial Circuit Court, St. Louis, the railroads' *forum non conveniens* motion was denied, with the plaintiffs' receipt of medical treatment in St. Louis cited as a factor.

[16] In this case, the accident occurred in Indiana and the plaintiff was from Indiana. See Pet. at 17.

Circuit Ct. 2005). In another case, the jury awarded $12 million to an employee who slipped on a wet floor. *Hayes v. Union Pac. R.R.*, No. 012-09799 (St. Louis Circuit Ct. 2005). The stakes in requiring state courts to adhere to proper and established interpretations of FELA could not be higher for the railroads.

A grant of the petition, or summary reversal, an alternative suggested by petitioner, would, in addition to addressing the errors below, remind lower courts of the need to adhere strictly to the text of FELA and to this Court's precedents.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, or, in the alternative, this Court should consider summarily reversing the decision below.

Respectfully submitted,

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